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Improving public perceptions by instilling objectivity in decisions to waive procurement regulations

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**IMPROVING PUBLIC PERCEPTIONS BY INSTILLING OBJECTIVITY
IN DECISIONS TO WAIVE PROCUREMENT REGULATIONS**

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Improving Public Perceptions by Instilling Objectivity in Decisions to Waive Procurement Regulations

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Abstract

The general public often perceives the government to be bureaucratic. One reason is that the public perceives that the government too rigidly enforces laws and regulations or that favoritism or bias influences decisions to make exceptions or waivers of rules. Although observed in various contexts, such perception is particularly evident in government contracting and procurement. This perception can erode the public confidence in government; thus, improving the public's perception is paramount. An approach to this perception problem involves instilling objectivity in a government decision to make an exception or "waiver" of a procurement rule or regulation. Analytical techniques can be used to evaluate the decision of whether or not to waive a particular procurement rule or regulation. Granted, a waiver may be unnecessary in exigent circumstances (where life or health is in imminent danger) because procurements under such exigent circumstances are often exempt from application of procurement rules. Yet, absent such exigent circumstances, a waiver of a particular regulation may require a formal exception by an administrative body, an executive, a court-issued injunction, or even legislation.

Introduction

Prompt action is often necessary in response to an event or course of events. Yet, regulations often prevent immediate action in procurement—though some exemptions exist which allow such necessary action to rectify emergencies or exigent circumstances, e.g., imminent danger to life, health or public welfare. In this paper, "prompt" action is action of an urgent nature intended for a legitimate purpose but that falls short of the definition of an "emergency." Thus, by analog to medical services, the author distinguishes between "urgent" treatment and "emergency" treatment. Broadly speaking, regulations that are obstacles to prompt action include environmental impact regulations and procurement regulations. Although the techniques discussed in this paper could be applied to both categories of regulations, the discussion in this paper is limited to procurement regulations.

Objective analytical techniques (such as benefit-cost ratio or return on investment) are often applied to decision-making involving alternatives. These analytical techniques can be used to evaluate the decision of which alternative to pursue. For example, benefit-cost ratio can be used to evaluate whether or not one should waive a particular regulation relating to procurement such as advertisement or competitive bidding. Granted, a waiver may be unnecessary in exigent circumstances that comprise an "emergency" where life or health is in



imminent danger; procurements under such exigent circumstances are often exempt from application of procurement rules. Yet, absent such exigent circumstances, exemption from a particular regulation may require a formal waiver or exception by an administrative body, an executive, a court injunction, or even legislation. Objective analytical techniques can effectively demonstrate whether it is economically justifiable to pursue a waiver in a particular situation . Objective legal analysis can be used to determine whether a decision is supported by applicable law. Using examples of procurements from 2005, the paper examines scenarios where waivers of certain regulations may be justified by analytical techniques, and in particular, benefit cost analysis. One example is the procurement of cruise ships as temporary housing in the City of New Orleans. Another example is the procurement of repairs to levees. Other examples include procurements in support of military operations in Iraq. In each of these examples, a “waiver,” exception or the other means of avoiding application of procurement regulations is assumed necessary to respond to a problem of an urgent nature.

To instill objectivity and improve public perceptions of procurements, the author calls for application of decision analysis to various alternatives that may possibly be used to avoid procurement regulations. Although not exhaustive, a list of alternatives is shown in Table 1.

Table 1. Alternative Strategies by Government Branch

Alternative	Legislative	Executive	Judicial	Administrative
I. Establish on-call contractor to expedite response				X
II. Waiver of procurement rule		X		X
III. Declaration a state of emergency		X		
IV. Activate national guard or reserve forces		X		
V. Seek special legislation	X			
VI. See injunctive relief through the judicial system			X	

In the following sections, the author discusses each alternative and gives examples of the potential of each in the order of its likely application.



Establish On-call Contractor

It is prudent for a jurisdiction—e.g., federal, state, or local—to establish contracts with one or more contractors to be immediately available or "on-call" in an emergency. Generally, an on-call contractor would be selected based on a competitive selection process. The process and contract form entered into with the contractor could vary depending on the jurisdiction. Thus, the jurisdiction would be prepared in the event of an "emergency" (according to the jurisdiction's definition of the term). Yet, many jurisdictions have limited the use of an on-call contractor to only to "emergencies" and not to "urgent" problems.

A best practice is to also establish contracts with one or more contractors who would be available or "on-call" within a specified time to address needs other than emergencies. Such a practice is allowed by procurement regulations in many jurisdictions and is justified on several grounds—including efficiency and responsiveness. For example, an on-call contract may take the form of a job order contract whereby (i) the base contract defines the terms, general conditions, and profit and overhead, and (ii) the individual work orders define the scope of work at the time the need arises. Besides emergencies, a growing number of public agencies use on-call contracts to address general or routine needs of the public agency. For example, the federal government uses indefinite delivery, indefinite quantity (IDIQ) contracts, which is a form of "on-call" contract, to perform various types of work. However, a problem with "on-call" contracts that are intended for general or routine work is the "response time." For example, the time which the contractor is required to respond may exceed the time required for "urgent" problems. Thus, such contracts for general or routine needs generally do not catalyze prompt response in urgent situations. Hence, "on-call" contracts may be frequently used to address emergencies and increasingly used to address general or routine needs, but are underused to address pressing problems that do not meet the definition of an emergency. A comparison of the frequency of use of "on-call" contracts is show in Table 2 below.

Table 2. Frequency of Use of "On-call" Contracts

Category of need	Use
Emergency	Very frequent
Urgent	Underused
Common or routine	Somewhat frequent

Waiver or Modification of Procurement Rules by Executive or Administrative Action

As stated above, having an "on-call" contract may obviate the need to waive a procurement rule. In the absence of an "on-call" contract, a public agency may consider the alternative of waiving a procurement rule to award a contract if permitted under the applicable law or regulation. For the purpose of this paper, the author assumes that waiver of a rule will not include waiving of competition but will still require some form of competitive selection. The understood intent of waiver of a procurement rule is to reduce time required to complete a procurement with little or no increased cost.

Assuming substantial benefits in waiving a given procurement rule, a small or negligible increase in cost results in a benefit-to-cost ratio much greater than unity. Similarly, the return on investment analysis would be positive. Thus, decision analysis can demonstrate support for



waiver of the procurement rule. Waiver of specific procurement rules can have varied effects on the outcome of a procurement—including both time and cost. The common theme among waiving specific procurement rules is the potential savings of time. For example, waiving in-print publication in favor of electronic publication can save time in the procurement schedule, and, at the same time, reduce cost by avoiding printing costs. Similarly, shortening the bid period can save time without substantially increasing cost, especially if combined with a cost plus fixed-fee (CPFF) contract. In another example, waiving a sealed bid in favor of a faxed or e-mailed bid can save time. In still another example, waiving a firm fixed-price in favor of a reimbursable contract having a fixed fee (such as CPFF) can save time in preparation of bids. In yet still another example, shortening the protest period and pre-approval of insurance can save time in the procurement schedule. Each of these examples is shown in Table 3 below.

Table 3. Modified Rule by Procurement Rule Category

Category	Modified Rule
Public advertisement	Notice by electronic publication only
	Shortened bid period
Sealed bids	Allowing faxed or e-mailed bids
Prebid meetings	Holding meeting by video conference
	Making optional vs. mandatory
Key contract terms	Establishing fixed fee vs. fixed price
Due diligence	Pre-approval of insurance
Bid Protest	Shortened protest period

In the event a need arises that requires urgent action, a public agency must determine at the Executive or a lower administrative level if the authority exists to waive or modify one or more procurement rules. If authority exists for such waiver or modification, the public agency may proceed with the procurement. If authority does not exist, the agency may have to conduct a regular procurement or may need to consider an alternative course of action. For example, following the events of levee failures due to hurricane Katrina, a dam failure in Hawaii and near record rainfall in California, the governor of state of California issued an executive order proclaiming a state of emergency of levees in California (Schwarzeneger, 2006). The order sought to obtain federal funds and waived advertising and competitive bidding rules to accomplish “expedited repairs.” Yet, the executive action had limitations because an executive order could not waive California’s Environmental Quality Act (CEQA); therefore, legislative action was required. The limitations of state-of-emergency declarations are discussed in the next section.

Declaration of State of Emergency

The intent of a chief executive’s declaration of a state of emergency for a jurisdiction has generally been to provide funds for disaster relief and recovery. By definition, the chief executive’s authority is often limited to response to an “emergency,” e.g., a disaster or crisis. Thus, an executive may not have authority to suspend procurement regulations depending on applicable federal or state law. An implied power of a chief executive is to execute contracts, e.g. purchase and sales contracts. Although an executive has these implied powers, such



authority is subject to the laws duly enacted by the legislative body of the jurisdiction. For example, Congress (as the legislature of the United States) may restrain the power of the President as the chief executive. Thus, Congress may restrain the ability of the President to conduct procurements, even under times of national emergencies (GPO, 2002). For example, when hurricane Katrina devastated the gulf states, the federal government could only respond initially within its existing authority despite the federal declaration of a state of emergency which authorized expenditure of federal funds. Congressional action was still required to obtain authority to waive procurement rules other than for “emergencies” as that term is defined by statute.

Activate National Guard or Other Forces

Under certain circumstances, a public agency may activate local units of the National Guard or other forces in response to an urgent problem. Although this is not an alternative for a local jurisdiction, the local agency may request such activation by the state or federal jurisdiction. One example is activation of National Guard units to maintain order after a natural disaster. Another example is activation of the Ready Reserve Force (RRF) for troop or equipment transport in a sea lift or air lift. Still another is activation of the Merchant Marines for transport or housing of civilians in times of war or national emergency, including natural disasters (US Congress, 1996). For example, following hurricane Katrina, the United States did not activate a US Merchant Marine ship, but instead negotiated a contract with a cruise line under a foreign flag to provide housing for displaced civilians in New Orleans.

Seek Special Legislation

Although special legislation may be sought to waive a procurement rule, this alternative would not normally apply for procurements to address urgent problems. The legislative body of a public agency will typically provide funding for a program and then allow the executive to carry out the program; thus, the legislative body does not consider every individual project (PMI, 2006). Since the legislative body does not consider every individual project, it would not normally consider waiving a procurement rule for an individual project. Further, the legislative body may not be currently in session, and thus, would be unable to promptly respond to a request for a waiver. Thus, legislative relief may be unavailable.

Seek Injunctive Relief

If the chief executive of a public agency has the authority to waive a procurement rule, the public agency would not likely have to seek injunctive relief. However, if the chief executive does not have such authority, the public agency may wish to consider seeking injunctive relief from the judicial system—provided there is a valid ground or grounds to seek such relief. If the public agency envisions seeking injunctive relief, the legal representative of the public agency should have prepared a motion for temporary restraining order (TRO) and supporting legal brief stating the ground(s) on which the motion is made. In this way, the injunctive relief sought is temporary suspension of the procurement rule.

Conclusion

Multiple alternatives may exist with respect to seeking an exemption to a procurement rule. These may include approaches involving the executive, administrative, legislative and



judicial branches of government. Depending on the alternative, waiver of a procurement rule may be fully supported by decision analysis; therefore, the decision to waive a rule would be instilled with objectivity. In addition, waiver of a procurement rule should be fully supported by applicable law and regulation as modified by court order. In any event, the procurement rule should not be ignored because this may lead to public perception of improper or illicit behavior. Instead, a formal waiver or exception should be obtained. Finally, notwithstanding waiver or modification of other procurement rules, a public agency should strive to maintain competition in procurements in order to preclude a public perception of favoritism, self-dealing, or other unethical behavior.

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